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No. 88-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a boycott directed at both furthering the constitutional rights of indigent criminal defendants and the economic benefit of their "striking" lawyers is beyond the scope of the antitrust laws.

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The Superior Court Trial Lawyers Association and the individual attorneys identified as Respondents in the Federal Trade Commission's Petition for a Writ of Certiorari, No. 88-1198, hereby cross-petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinions below, grounds for jurisdiction, and date of the judgment to be reviewed are hereby incorporated by reference from Petitioner's petition for a writ of certiorari, which Petition was received by Cross-Petitioner on January 23, 1989. This cross-petition is filed pursuant to Rule 19.5 of this Court, and may not be granted unless the Petitioner's petition is granted.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The First Amendment to the Constitution and Section One of the Sherman Act, 15 U.S.C. § 1, are set forth in the Appendix to Petitioner's petition at App. 230a, and are hereby incorporated by reference.

STATEMENT

1. This case concerns restriction of Cross-Petitioners' use of a traditional form of political expression in a clearly political context, the "strike", because the expression involved elements of economic pressure and furthered the economic self-interest of the strikers.[1] The facts necessary to an understanding of this case are set forth in Respondents' Brief in Opposition filed concurrently in the matter for which this cross-petition is presented and which is hereby incorporated by reference.[2]

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[1] Parties in addition to those identified in the case caption are Cross-Petitioners Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison and Joanne D. Slaight. None of the Cross-Petitioners is a corporation.

[2] *Federal Trade Comm. v. Superior Court Trial Lawyers Ass'n.*, No. 88-1198. The citation abbreviation "Pet. App." refers to the Appendix to the FTC's petition.

REASONS FOR GRANTING THE CROSS-PETITION

The court of appeals recognizes that boycotts such as the CJA lawyers' "strike" reflect both political expression directed at the vindication of constitutional rights and economic pressure aimed at the economic benefit of the boycotters. However, by testing the legality of such boycotts by whether their participants have market power, it fashions a rule which retreats from this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).[3]

The decision of the Supreme Court of Mississippi in *Claiborne*[4] leaves no doubt that the NAACP boycott sought not only the realization of constitutional rights, but also the direct economic benefit of the boycotters and other disadvantaged black residents of Claiborne County for whom they spoke. Consumer pressure on county retailers was used as a means to both ends. These ends were inseparable. Furthermore, the Mississippi decision indicates that the boycotting consumers did have economic power sufficient to force county retailers to take their demands seriously.[5] Therefore, even the *Claiborne* boycott, if reviewed under the holding of the court of appeals below, could be chilled by the spectre of a Sherman Act challenge.[6]

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[3] The Federal Trade Commission seeks a rule to the effect that even a significant political purpose and effect in a clearly political context does not remove "naked horizontal" anticompetitive conduct (Petition at 10) from *per se* Sherman Act condemnation. The inappropriateness of such a position is highlighted by its wish to be free to prosecute future *Claiborne*-type boycotts as *per se* antitrust violations, without any market power analysis.

[4] *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290 (Miss. 1980), *rev'd*, 458 U.S. 886 (1972).

[5] The decision of the Mississippi Supreme Court suggests that the Claiborne boycotters may indeed have had market power. *Id.* at 1294.

[6] The NAACP boycott was, in fact, challenged as an antitrust violation under state law. *See id.* at 1301.

The NAACP boycotters in March 1966 presented some twenty-one demands upon public officials of both Claiborne County and the City of Port Gibson which allegedly, if not met, would lead to "selective buying campaigns" and "peaceful demonstrations." Among these demands were the following:

1. "Three Negro policemen should be employed in Port Gibson . . .";
2. "Negroes should be employed in the [county] welfare office . . .";
3. "Negroes should be named to the Board of Education . . .";
4. "Official and semi-official boards and commissions, now and in the future, must include appropriate numbers of Negro citizens";
5. The "Claiborne County Hospital" and "staff" should be immediately desegregated;
6. "All stores must employ Negro clerks and cashiers";
7. "Two or more deputy sheriffs must be hired";
8. "[A] Negro County Agent [must] be employed . . .";
and
9. "[A] full time home demonstration agent [must] be employed . . . ."

393 So. 2d at 1295-96.

The court observed that:

> There was extended testimony relative to the demands for the employment of black citizens at responsible jobs, and witnesses express[ing] the view that these demands should be met even if either it meant the discharge of white employees already on these jobs or that there would be two employees doing the job requiring only one employee . . . . (*Id.* at 1300).

The demands were pursued by marches, by picketing, by the opening of a boycotters' retail store, "Our Mart" (which the Mississippi Supreme Court called "successful," *id.* at 1296), and by other activities designed to pressure white retailers and government officials to accept the boycotters' mixed political/economic goals.

The Mississippi Supreme Court recognized that this conduct could not be subjected to Mississippi's antitrust law, because that law was patterned after the Sherman Act, and because the Supreme Court in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (and companion cases), had held a similar pursuit of both political and economic goals to be beyond the scope of federal antitrust law. The antitrust count was therefore dismissed. 393 So. 2d at 1300-01.

Reversing the decision of the Mississippi Supreme Court on other grounds, this Court implicitly ratified the state court's antitrust analysis by referring to the railroad's purpose in *Noerr* "to destroy legitimate competition." *Claiborne*, 458 U.S. at 914. This Court also cited with approval the statement of Judge Stephenson in *Missiouri v. National Organization for Women, Inc.*, that:

> [The] right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of boycott.

458 U.S. at 914 n.48, quoting *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1317 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

The court of appeals below was convinced that the "strike" in this case was politically expressive conduct. (Pet. App. 46a-47a). Nevertheless, the Federal Trade Commission, supported by the court of appeals below, says that reliance upon *Claiborne* to avoid the jurisdiction of the Sherman Act is appropriate only in "situations in which the boycotters are not economic competitors promoting a parochial economic interest." (Petition at 6-7).

Such a rule would jeopardize the *Claiborne* result. *Claiborne* was an effort by the boycotters that involved both "economic coercion" and traditional political lobbying. Their goals were parochial economic interests—to obtain, among other goals, more jobs in local commerce and government, even if it meant replacing existing employees. To achieve these goals, the boycotters leveraged their economic power as consumers. Therefore, under the reasoning of the court of appeals, the *Claiborne* boycott would not be insulated from antitrust scrutiny and, absent a rule of immunity that emphasizes significant non-economic aspects of the boycott, could potentially be found to violate the antitrust laws. While the boycotters in *Claiborne* may not have had the support of all blacks, and while the potential relevant market for retail goods may be smaller, or perhaps a bit larger, than the boundaries of Claiborne County, a full market power analysis of any and all markets alleged to be relevant markets for antitrust purposes should not be required for a *Claiborne*-type boycott, or the "strike" here, to be protected by the First Amendment.

Judge Silberman, in his concurring opinion below, saw the problem with making the First Amendment protection of political expression dependent on a total absence of parochial economic interest. As he noted:

> Motivation . . . in the sense of the absence of desire for personal enrichment, cannot be the determinant of what speech is protected as political. If it were --since we all act with some attention to our economic interests—*Noerr* immunity could seldom be invoked. (Pet. App. at 59a).

It is unrealistic to expect protected political expression to be totally free of direct economic self-interest. *See Noerr*, 365 U.S. at 139. But, in distinction from Judge Silberman, this Court, we believe, would not want the legality of the admittedly political expression of a *Claiborne*-type boycott to stand or fall on a market power test.

The boycott in *Claiborne*, like the CJA lawyers' strike, had two distinctive political features not found in the medical or other traditional boycott cases of the type the FTC is so afraid of losing. (Petition at 19). First, in *Claiborne*, the boycott was to aid the constitutional rights of fundamentally unrepresented, disenfranchised blacks in a rural Mississippi county in 1966. Similarly, this case involves the Sixth Amendment rights of indigent criminal defendants and a constitutionally mandated system of criminal justice (each of which tends to be politically unpopular, *see* Opposition at 5 n.8). Second, while the protestors stood to gain personally—through greater job opportunities, in *Claiborne*, and better compensation, in this case—they also were acting as surrogates for disenfranchised persons who could not or would not act for themselves—the non-participating blacks in *Claiborne*, and the indigent criminal defendant-clients in this case.

This is the political and constitutional context which distinguishes this case and *Claiborne* from doctors boycotting health insurers' documentation requirements used to review dental reimbursement claims. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). Unlike this case, that case did not involve political activity compelling First Amendment protection.

Traditional means of expression on constitutional issues in the American political process may be forced to change substantially if the rule below applies to *Claiborne*-type boycotts as here. As a practical matter, *Noerr* and *Claiborne* could be seriously eroded. Because the CJA lawyers' "strike" should be controlled by *Noerr* and *Claiborne*, the court of appeals should have reversed the FTC's order and remanded to the Commission with an order to dismiss the action.

CONCLUSION

Accordingly, if the Petition for Writ of Certiorari is granted, this Cross-Petition for a Writ of Certiorari also should be granted.

Respectfully submitted,

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